INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and other authorities involved	3
Statement	3
Summary of argument	6
Argument:	
I. The court below properly refused to consider the merits of the present case	10
A. *The record before the lower court was insufficient to allow a determination of the issues which petitioner seeks to raise*	11
B. *The court below did not err in refusing to remand the case to the District Court in order that the statement of evidence might be properly authenticated*	15
II. If the issue of *res judicata* is properly before this Court, it should be held that the decision of the Board of Tax Appeals is binding on the bankruptcy court	20
III.	37
Conclusion	38
Appendix	39

CITATIONS

Cases:	
Alexander v. *Cosden Pipe Line Co.*, 290 U. S. 484	16
American Woolen Co. v. *White*, 56 F. (2d) 716	33
Anderson, In re, 279 Fed. 525	21
Anton, In re, 11 F. Supp. 345	36
Bankers' Reserve Life Co. v. *United States*, 44 F. (2d) 1000, certiorari denied, 283 U. S. 836	33
Barber Asphalt Co. v. *Standard Co.*, 275 U. S. 372	15, 16, 19, 20
Bindley v. *Heiner*, 38 F. (2d) 489	33
Blitz v. *Brown*, 7 Wall. 693	12
Brady Foundry Co., In re James A., 3 F. (2d) 437	36
Buessel v. *United States*, 258 Fed. 811	11
Camp v. *United States*, 44 F. (2d) 126	33
Campbell v. *Read*, 2 Wall. 198	12
Carson v. *Hurt*, 250 Fed. 30	11

Cases—Continued. Page

Chang Chow v. *United States*, 53 F. (2d) 637, reversed, 286 U. S. 530 ---- 18, 19
Chickasaw Wood Products Co. v. *Paysinger*, 84 F. (2d) 476 ---- 11, 19
Clayton Magazines, In re, 77 F. (2d) 852 ---- 22
Commonwealth of Massachusetts v. *Meehan*, 67 F. (2d) 638 ---- 33, 34
Cossack v. *United States*, 63 F. (2d) 511 ---- 16
Cunningham v. *Commissioner*, 20 B. T. A. 428 ---- 28
Edwards v. *Holland Banking Co.*, 75 F. (2d) 713 ---- 15
Fairbanks, etc., Co. v. *American Co.*, 276 U. S. 305 ---- 20
General Equity Rule 75, In re, 222 Fed. 884 ---- 16, 19
Green v. *MacLaughlin*, 55 F. (2d) 423 ---- 33
Gunning v. *Cooley*, 281 U. S. 90 ---- 37
Hard & Rand v. *Biston Coffee Co.*, 41 F. (2d) 625 ---- 16
Heffron Co., In re, 216 Fed. 642 ---- 34
Helvering v. *Taylor*, 293 U. S. 507 ---- 37
Henderson County, N. C. v. *Wilkins*, 43 F. (2d) 670 ---- 33
Hill v. *Martin*, 296 U. S. 393 ---- 35
Hoffman v. *Commissioner*, 7 B. T. A. 303 ---- 28
Houston v. *Southwestern Tel. Co.*, 259 U. S. 318 ---- 16
Interstate Folding Box Co. v. *Empire Box Corp.*, 68 F. (2d) 500, certiorari denied, 292 U. S. 657 ---- 11, 12
Krauss Bros. Co. v. *Mellon*, 276 U. S. 386 ---- 12
Larsen v. *Northland Trans. Co.*, 292 U. S. 20 ---- 31
Lee Hin v. *United States*, 72 F. (2d) 60 ---- 17, 18, 19
Local 167 v. *United States*, 291 U. S. 293 ---- 20
Malony v. *Adsit*, 175 U. S. 281 ---- 12
Meifert, In re, 57 F. (2d) 861 ---- 11, 20
Meyer v. *Mansur & Tebbetts Implement Co.*, 85 Fed. 874 ---- 12
Mitchell v. *First National Bank of Chicago*, 180 U. S. 471 ---- 37
Moss v. *Gilchrist-Fordney Co.*, 24 F. (2d) 931 ---- 16
New Jersey v. *Anderson*, 203 U. S. 483 ---- 33, 34
Newton v. *Consolidated Gas Co.*, 258 U. S. 165 ---- 16
Ohio Steel Foundry Co. v. *United States*, 38 F. (2d) 144 ---- 33
Ohl & Co. v. *Smith Iron Works*, 288 U. S. 170 ---- 12
Old Colony Tr. Co. v. *Commissioner*, 279 U. S. 716 ---- 31, 32, 34, 35
Origet v. *United States*, 125 U. S. 240 ---- 11
Oriole Phonograph Co. v. *Kansas City Fabric Products Co.*, 34 F. (2d) 400, certiorari denied, 280 U. S. 609 ---- 11
Paramount Public Corporation, In re, 85 F. (2d) 42 ---- 35
Parker v. *St. Sure*, 53 F. (2d) 706 ---- 15
Plains Buying and Selling Association v. *Commissioner*, 5 B. T. A. 1147 ---- 22, 28
Redmond & Co., In re, George F., 17 F. (2d) 128 ---- 34
Richle v. *Margolies*, 279 U. S. 218 ---- 28, 29, 30, 36, 37
Royal Baking Co. v. *Hessey*, 76 F. (2d) 645, certiorari denied, 296 U. S. 595 ---- 35

Cases—Continued. Page

Ruby v. *Atkinson*, 93 Fed. 577 ---- 12
Second Nat. Bank of Saginaw v. *Woodworth*, 66 F. (2) 170 ---- 37
Sommer v. *Rotary Lift Co.*, 66 F. (2d) 809 ---- 15, 17
Southern Pacific R. R. Co. v. *United States*, 168 U. S. 1 ---- 14
Southwestern Bell Telephone Co. v. *San Antonio*, 75 F. (2d) 880, certiorari denied, 295 U. S. 754 ---- 15
Struett v. *Hill*, 269 Fed. 247 ---- 15, 17
Tait v. *Western Md. Ry. Co.*, 289 U. S. 620 ---- 31, 37
Title & Trust Co. v. *Wernich*, 68 F. (2d) 811 ---- 11, 12, 20
Trust Co. of Florida v. *Gault*, 69 F. (2d) 133 ---- 11, 12, 19
United States v. *King & Howe*, 78 F. (2d) 693 ---- 12
United States v. *Robert Esnault Pelterie*, No. 41, October Term, 1936, decided Dec. 7, 1936 ---- 15
Walker v. *Lee*, 71 F. (2d) 622 ---- 11, 19
Warren Mfg. Co. v. *Tait*, 60 F. (2d) 982 ---- 33
Western Powder Co. v. *Brewerton Coal Co.*, 81 F. (2d) 85 ---- 15
Western Wheeled Scraper Co. v. *United States*, 72 F. (2d) 487, certiorari denied, No. 237, October 12, 1936 ---- 33
Williams Oil Corp., In re W. P., 265 Fed. 401 ---- 34
Wilson, In re, 16 F. (2d) 177 ---- 16
Yangtsze Rapid S. S. Co. v. *Deutsche-Asiatische Bank*, 59 F. (2d) 8 ---- 16
Zurich General Acc. & L. Co. v. *Mid-Continent P. Corp.*, 43 F. (2d) 355 ---- 16

Statutes:

Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as amended:
Sec. 25 (U. S. C., Title 11, Sec. 48 (a)) ---- 39
Sec. 63 (U. S. C., Title 11, Sec. 103) ---- 39
Sec 64 (U. S. C., Title 11, Sec. 104) ---- 8, 21, 30, 39
Revenue Act of 1924, c. 234, 43 Stat. 253 ---- 9
Revenue Act of 1926, c. 27, 44 Stat. 9:
Sec. 282 ---- 22
Sec. 1001, as amended (U. S. C., Title 26, Sec. 642) ---- 31, 40
Sec. 1005 (U. S. C., Title 26, Sec. 640) ---- 31, 40
Revenue Act of 1928, c. 852, 45 Stat. 791:
Sec. 272 ---- 27, 41
Sec. 273 ---- 42
Sec. 274, as amended ---- 8, 21, 22, 25, 27, 31, 34, 43
Sec. 601 (U. S. C., Title 26, Sec. 617 (c)) ---- 44
Revenue Act of 1932, c. 209, 47 Stat. 169:
Sec. 322 (c) ---- 33, 35, 45
Sec. 1101 (U. S. C., Title 26, Sec. 642) ---- 40
Revenue Act of 1934, c. 277, 48 Stat. 680:
Sec. 505 ---- 43
Revised Statutes:
Sec. 3466 (U. S. C., Title 31, Sec. 191) ---- 46

Miscellaneous: Page

Collier on Bankruptcy, Thirteenth Ed., 1923, Vol. 2, pp. 1389–1390 ---- 36

General Order in Bankruptcy XXXVI, as amended April 17, 1933, 288 U. S. 621 ---- 10, 40

H. Conference Rep. 356, 69th Cong., 1st Sess., pp. 45–46 ---- 25

H. R. 1, 69th Cong., 1st Sess., p. 149 ---- 23

S. Rep. 52, 69th Cong., 1st Sess., p. 31 ---- 23

Treasury Regulations 74:

Art. 1191 ---- 28, 47

Art. 1192 ---- 28, 48

United States Supreme Court Equity Rules, as amended May 31, 1932, 266 U. S. 570, Rule 75 ---- 2, 6, 10, 16, 46

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 309

S. P. KELLY, TRUSTEE IN BANKRUPTCY FOR THE CARLISLE PACKING COMPANY, A CORPORATION, BANKRUPT, PETITIONER

v.

UNITED STATES OF AMERICA, AND THE COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES OF AMERICA, AND THE COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the special referee in bankruptcy (R. 90–102) is not reported. The memorandum decision of the District Court (R. 138–153) is reported in 12 F. Supp. 11.

The opinion and dissenting opinion of the Circuit Court of Appeals (R. 158–161) are reported in

83 F. (2d) 783, and the opinion and dissenting opinion on rehearing (R. 163–168) are reported in 84 F. (2d) 541.

The opinion of the United States Board of Tax Appeals in the proceeding before it relative to the same tax liability (R. 9–13) is reported in 29 B. T. A. 514.

JURISDICTION

The decree of the Circuit Court of Appeals affirming the decision of the District Court was entered on May 5, 1936. (R. 162.) A petition for rehearing was filed June 1, 1936, and denied June 29, 1936. (R. 163.) The petition for a writ of certiorari was filed August 24, 1936, and was granted October 12, 1936. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, on an appeal from a decision allowing a claim against a bankrupt estate for income taxes in excess of $500, the Circuit Court of Appeals properly refused to consider the merits of the case, in the absence of a statement of evidence duly verified by a certificate of authentication of the District Court as required by Equity Rule 75 (b).

2. In the alternative, was the Circuit Court of Appeals required to remand the case to the District Court to have a statement of the evidence authenticated under Equity Rule 75 (b)?

3. If the Circuit Court of Appeals should have reviewed the issues raised on the merits, was the decision of the Board of Tax Appeals entered prior to the adjudication in bankruptcy *res judicata* as to those issues?

STATUTES AND OTHER AUTHORITIES INVOLVED

These will be found in the Appendix, *infra*, pp. 39–49.

STATEMENT [1]

On December 6, 1933, the United States Board of Tax Appeals promulgated its findings of fact and opinion in the two consolidated cases of *Carlisle Packing Co.* v. *Commissioner of Internal Revenue*, Docket Nos. 55209 and 64926 (29 B. T. A. 514). The final orders of the Board pursuant to that opinion, which were entered on January 4, 1934 (R. 16, 19), sustained the Commissioner in his determination of income tax deficiencies for that company for the fiscal years ending November 30, 1927, November 30, 1928, and November 30, 1929, in the respective amounts of $12,429.82, $1,435.49, and $1,473.88 (R. 10–14). No appeal was ever taken. (R. 93.) On January 12, 1934, a summary assessment of these taxes, plus interest, was made against the company.

Meanwhile, on January 10, 1934, a receiver for the company had been appointed by the Superior

[1] Respondent contends that the statement of evidence must be disregarded because not properly authenticated. See Point I, *infra*. Many of the facts set out in this Statement are found only in the unauthenticated record. They are set out here merely for the convenience of the Court.

Court of the State of Washington, Whatcom County (R. 92), and on January 19, 1934, an involuntary petition in bankruptcy was filed against it in the United States District Court for the Western District of Washington. (R. 2.) On February 9, 1934, the company was adjudicated a bankrupt by that court. (R. 2.)

In June, 1934, the Collector of Internal Revenue for the District of Washington filed a claim in bankruptcy covering assessments of the income taxes previously mentioned in the aggregate amount of $20,515.32, plus interest. (R. 3–5.) The trustee filed objections to the claim (R. 6–7), and a hearing was had before a referee (R. 7–89). At this hearing the attorney for the Government introduced in evidence, and as part of its proof of claim, certified copies of the opinion and decisions of the Board in the cases previously mentioned, and certified copies of the assessment list. (R. 8–24.) The attorney for the Government also objected to the introduction of any evidence by the trustee as to the merits of the tax claim, on the ground that the decision and orders of the Board on the same matters had become final and were *res judicata*. (R. 24–25.) The referee admitted the evidence, reserving his ruling on the objection to its admission. (R. 25.)

On December 31, 1934, the referee disallowed the claim, holding that the decision of the Board of Tax Appeals was not *res judicata* because of special features governing its jurisdiction and that

of the bankruptcy court, and also holding, on the merits, that the claim for taxes should be disallowed. (R. 90–102.)

On January 7, 1935, a petition for review of the order was filed by the Government. (R. 107–112.) At the hearing before the District Judge the bankrupt's income tax returns for the fiscal years ending November 30, 1928, and November 30, 1929, were ordered made a part of the record. (R. 112–113.) On May 6, 1935, the District Judge reversed the order of the referee, and entered a decree for the United States in the full amount claimed. (R. 114–115.)

Pursuant to a praecipe served and filed by the trustee (R. 128–130), the clerk of the District Court on August 13, 1935, certified to the correctness of a typewritten transcript of certain portions "of the record, papers and other proceedings in the * * * cause as is required by praecipe of counsel" (R. 131–132). The transcript, so certified, was duly filed in the Circuit Court of Appeals (R. 133). It did not contain any certification of authenticity by the District Judge as to any statement of evidence submitted to and acted upon by either the referee or the District Judge.

The court below, on its own motion, raised the question of the sufficiency of the record (R. 158–161) and held, by a divided court, that the evidence was not properly brought into the record before it, and that it could not consider the

trustee's assignments of error because they raised questions the consideration of which would require an examination of the evidence. It accordingly affirmed the decree of the District Court (R. 157–162). In denying the petition to rehear, again by a divided court, the court below rejected the suggestion that the case be remanded to the District Court to supply a properly authenticated statement of the evidence by a supplemental transcript (R. 166–168).

SUMMARY OF ARGUMENT

The court below declined to review the merits of the case for the reason that the petitioner had failed to comply with the provision of Equity Rule 75 (b) (Appendix, *infra*, p. 46), requiring authentication of the statement of evidence by the District Judge.

The petitioner admits that he did not comply with Rule 75 (b) but contends that the court should have granted his request that the case be remanded to the District Court in order that the statement of evidence might be properly authenticated or in the alternative that the court below could have considered the issues of law involved without a statement of evidence.

It is settled that where the questions to be decided depend upon an examination of the evidence and the statement of evidence included in the record has not been authenticated as required by Equity Rule 75 (b), the decree of the lower court on issues requiring an examination of the evidence

must be affirmed. The rule is similar to that applied in law cases where there is no properly authenticated bill of exceptions.

Most of the cases cited by the petitioner in support of his position that the case should be remanded for authentication are cases in which the record was properly authenticated but there was not a condensed, narrative statement of the evidence. In that type of case the courts have not always insisted on the strict enforcement of the rule, although they may do so, and have done so in some instances.

There are but few instances in which the appellate courts have remanded a case for authentication of the record. We submit that if they may do so in their discretion, there was no abuse of discretion by the court below in this case.

The primary record in this case presented no question of law which the court below might have reviewed. It could not determine whether the bankrupt was liable for the tax or whether the Board's previous decision was *res judicata* without examining the statement of evidence. It was not required to pass on the hypothetical question whether the Board's decision could ever be *res judicata* in a bankruptcy court.

Inasmuch as the court below did not pass upon the question whether the Board's previous determination of the bankrupt's liability for the fiscal years 1927, 1928 and 1929 was *res judicata,* we believe that this Court should not review that ques-

tion. On the record as it stands it can only consider the hypothetical question whether in any case the Board's decision could have that effect. We discuss the issue only because it was raised in the petition for a writ of certiorari.

We admit that under Section 64 (a) of the Bankruptcy Act (Appendix, *infra,* p. 39) the bankruptcy court is given authority to examine the Government's claim for taxes and is not bound by the Commissioner's assessment. But it does not follow that the bankruptcy court may redetermine a tax claim after it has been adjudicated by the Board of Tax Appeals, the decision of the Board having been entered prior to the filing of the petition in bankruptcy and the adjudication in bankruptcy.

Section 274 (a) of the Revenue Act of 1928 (Appendix, *infra,* p. 43) provides that no petition shall be filed with the Board after the adjudication in bankruptcy, but it does not provide that a petition already filed with the Board shall be dismissed. The implication is that the Board and the bankruptcy court have concurrent jurisdiction in the second type of case.

The legislative history of the provision supports this construction, and further shows that Congress expected the bankruptcy court to follow a prior decision of the Board. The Commissioner of Internal Revenue has placed that construction upon it in his regulations, and the Board of Tax Appeals has adopted that construction.

The concurrent jurisdiction of the Board and the bankruptcy court is similar to the concurrent jurisdiction of the Board and the District Courts in cases where an appeal was taken to the Board under the Revenue Act of 1924 (c. 234, 43 Stat. 253), and decided under the Revenue Act of 1926. In that situation the courts have held that the taxpayer could sue for a refund in the District Court, notwithstanding the Board's decision, but that the latter would be *res judicata* as to issues determined by the Board.

With respect to cases where the petition to the Board has been filed after the passage of the Revenue Act of 1926, the District Courts and the Court of Claims have not accepted jurisdiction of subsequent suits for refund, except as to certain issues covered by statutory exceptions.

There is no merit to the taxpayer's contention that the doctrine of *res judicata* does not apply because the bankruptcy proceeding involves the rights and claims of all creditors, and not merely the claim of the Government. The instant proceeding concerns only the Government's claim, and the question is whether the Board's decision on that claim is conclusive.

While the trustee was not a party before the Board, he is in privity with the bankrupt, and a decision which would be conclusive as to the bankrupt would be conclusive as to the trustee.

ARGUMENT

I

THE COURT BELOW PROPERLY REFUSED TO CONSIDER THE MERITS OF THE PRESENT CASE

Petitioner admits that he did not comply with the provisions of Equity Rule 75 (b), as amended (*infra*, p. 46), which is made applicable to appeals in bankruptcy by virtue of General Order in Bankruptcy XXXVI, as amended (*infra*, p. 40). There was no certification of the record except by the Clerk of the District Court, who certified to the correctness of a typewritten transcript of certain portions of the record, papers and proceedings as required by the praecipe of counsel. Upon a determination of that fact, the court below declined to review the merits of the case, and affirmed the decision of the District Judge. We submit that this disposition of the case was in all respects proper.

First, petitioner contends that the court below could, upon the record before it, decide the issue of law involved in this proceeding. Second, and in the alternative, he urges that the court should have granted his request that the case be remanded to the District Court so that the record could be made adequate to present this legal issue. We shall discuss these contentions in that order.

A. The record before the lower court was insufficient to allow a determination of the issues which petitioner seeks to raise

The principle is well settled that where the decision of any question raised in an appellate court depends upon an examination of the evidence, an improperly certified statement of evidence will be treated as a nullity, and the decision below on any question which requires consideration of the evidence will be affirmed. *Chickasaw Wood Products Co.* v. *Paysinger,* 84 F. (2d) 476 (C. C. A. 8th); *Trust Co. of Florida* v. *Gault,* 69 F. (2d) 133, 134 (C. C. A. 5th); *Interstate Folding Box Co.* v. *Empire Box Corp.,* 68 F. (2d) 500 (C. C. A. 7th), certiorari denied, 292 U. S. 657; *Oriole Phonograph Co.* v. *Kansas City Fabric Products Co.,* 34 F. (2d) 400, 401 (C. C. A. 8th), certiorari denied, 280 U. S. 609. See also *Walker* v. *Lee,* 71 F. (2d) 622 (C. C. A. 9th); *Title & Trust Co.* v. *Wernich,* 68 F. (2d) 811 (C. C. A. 9th); *In re Meifert,* 57 F. (2d) 861 (C. C. A. 6th); *Buessel* v. *United States,* 258 Fed. 811 (C. C. A. 2d). It is immaterial that the record contains a statement to the effect that the evidence printed therein has been examined and found correct by counsel. *Carson* v. *Hurt,* 250 Fed. 30, 33 (C. C. A. 5th). This principle is closely analogus to the rule in proceedings at law that no questions arising on a bill of exceptions will be considered if the bill is not authenticated by the district judge. *Origet* v. *United States,* 125 U. S.

240; *Malony* v. *Adsit*, 175 U. S. 281; *Ohl & Co.* v. *Smith Iron Works*, 288 U. S. 170; *United States* v. *King & Howe*, 78 F. (2d) 693 (C. C. A. 2d). See also *Krauss Bros. Co.* v. *Mellon*, 276 U. S. 386, 390. And in the absence of a properly authenticated record an appellate court is justified in dismissing an appeal. *Blitz* v. *Brown*, 7 Wall. 693; *Campbell* v. *Read*, 2 Wall. 198; *Ruby* v. *Atkinson*, 93 Fed. 577 (C. C. A. 5th); *Meyer* v. *Mansur & Tebbetts Implement Co.*, 85 Fed. 874 (C. C. A. 5th).

It is true, as petitioner points out (Br. 14), that in *Interstate Folding Box Co.* v. *Empire Box Corp.*, *supra*, and in *Title & Trust Co.* v. *Wernich*, *supra*, the appellate court, after stating the rule that the decree should be affirmed in the absence of a properly certified statement of evidence, went on to say that an examination of the evidence disclosed that it supported the decree of the lower court. This was done in the *Wernich* case to avoid putting the appellant to useless expense, and was accompanied by a warning that a failure to comply with the rule in future cases would prevent an appellant from securing a ruling on the issues he wished to raise. In *Trust Co. of Florida* v. *Gault*, *supra*, where there was a reversal, the court ruled on questions raised by the pleadings and findings of fact and declined to consider the evidence.

However, petitioner urges that the issues raised by the appeal to the court below could have been decided by it upon those portions of the record which were properly before it. These are said to

be (a) the order of adjudication in bankruptcy (R. 2); (b) the Government's claim for income taxes (R. 3–5); (c) the objections to this claim, filed by the trustee (R. 6–7); and (d) the decision of the District Court disaffirming the order of the special referee (R. 114–115).

The two questions raised before the court below as disclosed by the assignment of errors (R. 119–122), were, first, whether the taxpayer corporation realized a taxable profit on the transfer of certain assets, having a depreciated cost of $346,106.87,[2] to a bank in return for the taxpayer's cancelled notes in the amount of $650,000,[3] and second, whether a prior decision of the Board of Tax Appeals was *res judicata* on that issue. Obviously, no decision could be made on the first of these issues without a full consideration of the evidence. Petitioner does not contest this. He does urge, however, that the decision on the second point can be considered as separate, and can be decided without a reference to anything but the four items mentioned above.

The question whether the District Court was bound by the decision of the Board of Tax Appeals

[2] This figure is not in the assignments of error. See the Board of Tax Appeals' opinion (R. 12) and the District Court's opinion (R. 140).

[3] This question relates to the tax liability for the fiscal year 1927. The fiscal years 1928 and 1929 are also involved because, if the taxpayer's contentions as to 1927 are upheld, the return for 1927 will disclose a net loss which is deductible in 1928 and 1929.

is more than a pure question of law. The court would be required to determine several preliminary questions of fact: what were the issues before the Board; what was determined by the Board; were the same parties involved in that case as in the present case. See *Southern Pacific R. R. Co.* v. *United States,* 168 U. S. 1, 25. These facts could have been ascertained only by examining the statement of evidence. They are not set out, or even adverted to, in any of the four items upon which petitioner here relies.

Nor could the court below assume that the facts would all be determined in favor of the Government, so that only the issue of law would remain for decision. Petitioner, in asking it to do so, is asking that it decide a wholly hypothetical question—a decision beyond its power as a constitutional court.

Petitioner does not contend (Br. 12) that the court below could utilize as facts the statements contained in the opinion of the District Court (R. 138–153), and it is clear that they cannot be so utilized. The opinion was, it is true, brought before the Circuit Court of Appeals by a special order (R. 135), but the District Judge did not adopt its opinion as findings of fact. In the absence of such an adoption, facts stated in the opinion are not findings of fact and are not a part of the record. *Western Powder Co.* v. *Brewerton Coal*

Co., 81 F. (2d) 85 (C. C. A. 7th); *Southwestern Bell Telephone Co.* v. *San Antonio*, 75 F. (2d) 880 (C. C. A. 5th), certiorari denied, 295 U. S. 754; *Edwards* v. *Holland Banking Co.*, 75 F. (2d) 713 (C. C. A. 8th); *Parker* v. *St. Sure*, 53 F. (2d) 706 (C. C. A. 9th). See *United States* v. *Robert Esnault Pelterie*, No. 41, October Term, 1936, decided Dec. 7, 1936. Consequently, the record, we submit, presented no substantial question of law.

B. The court below did not err in refusing to remand the case to the District Court in order that the statement of evidence might be properly authenticated

Petitioner urged, in a petition for rehearing, that the court below remand the case to the District Court for a settlement and authentication of the transcript, in the event that the court concluded that the record before it was inadequate for any decision. He now raises the same issue here, and cites, as supporting his contention, the decision of this Court in *Barber Asphalt Co.* v. *Standard Co.*, 275 U. S. 372, and the decisions of the court below in *Sommer* v. *Rotary Lift Co.*, 66 F. (2d) 809 and *Struett* v. *Hill*, 269 Fed. 247. Each of the cases is clearly distinguishable, and, we submit, none has any bearing on the present issue.

In the *Barber Asphalt Co.* case, *supra*, the record did not lack the authentication required by Rule

75 (b), but, instead, failed to conform to another requirement of that rule relating to the condensation of the record and the preparation of a narrative statement of the evidence. This Court, implying that a failure to comply with Rule 75 (b) should not, in general, be condoned, held that the action of the Circuit Court of Appeals for the Seventh Circuit in dismissing the appeal was too harsh a penalty, in view of the fact that that court had previously permitted violations of the rule.

If this were a case involving simply a failure to reduce the evidence to narrative form, it would be necessary to admit that no consistent practice has been established by the courts. See, *e. g., Newton* v. *Consolidated Gas Co.,* 258 U. S. 165, 174; *Houston* v. *Southwestern Tel. Co.,* 259 U. S. 318; *Yangtsze Rapid S. S. Co.* v. *Deutsche-Asiatische Bank,* 59 F. (2d) 8 (C. C. A. 9th); *Zurich Co.* v. *Mid-Continent Corp.,* 43 F. (2d) 355 (C. C. A. 10th); *Hard & Rand* v. *Biston Coffee Co.,* 41 F. (2d) 625 (C. C. A. 8th); *Moss* v. *Gilchrist-Fordney Co.,* 24 F. (2d) 931 (C. C. A. 5th); *In re Wilson,* 16 F. (2d) 177 (C. C. A. 7th). With these cases compare *Alexander* v. *Cosden Pipe Line Co.,* 290 U. S. 484; *Cossack* v. *United States,* 63 F. (2d) 511 (C. C. A. 9th); *In re General Equity Rule 75,* 222 Fed. 884 (C. C. A. 6th).

But this is not a case of failure to condense the evidence; it is a case of a failure to secure its

authentication. We submit that such a record does not allow the appellate court to review any question which requires that the evidence be examined. See cases cited at pp. 11–12, *supra.*

Nor is *Struett* v. *Hill, supra,* contrary to these decisions. That case involved the question whether the District Judge was justified in refusing to approve the statement of evidence presented to him after the expiration of the term, a petition for appeal, bond, assignments of errors and citation having been filed shortly before the term expired. The Circuit Court of Appeals held merely that the expiration of the term at which the decree was rendered did not deprive the court of power to approve the statement of evidence. We do not see that that case has any application here.

There are, it is true, two instances in which the court below has remanded the case to the District Court for proper certification of the transcript. *Sommer* v. *Rotary Lift Co.,* 66 F. (2d) 809; *Lee Hin* v. *United States,* 72 F. (2d) 60. In each of these cases, however, there were special circumstances present which are not shown here.

In the *Sommer* case, the chief objections to the transcript were that it was not condensed and that it included a mass of irrelevant material, and the case was remanded in order that the evidence could be condensed and the irrelevant portions omitted. The statement of evidence had not been

formally approved by the trial judge, and this defect was also to be corrected. However, the District Court had entered an order upon objection to the praecipe (p. 810) authorizing the appellant "to include as a part of the printed record on appeal the reporter's transcript of proceedings on motion for preliminary injunction and all proceedings on all other motions, hearings and matters reported and of which a transcript was prepared." The court had, in other words, given its approval to the record, and the failure formally to approve the statement of the evidence was not a substantial departure from the rule. Here, on the contrary, there is nothing to advise the court below that the contents of the statement of evidence had the approval of the trial judge.

Special circumstances were also present in the *Lee Hin* case, *supra*. There the same attorney had appealed another case shortly before, in which his appeal had been dismissed for want of a bill of exceptions. *Chang Chow* v. *United States,* 53 F. (2d) 637. This Court reversed that decision, holding that no bill of exceptions was required, but remanded the case to the court below to determine whether the record had been properly authenticated, and if it had not, in its discretion to remand it to the District Court for authentication. 286 U. S. 530. The court below, thereupon reversed the decision of the District Court without requiring a further certificate, apparently for the reason

that no question of authenticity had been raised except by this Court. 63 F. (2d) 375. See *Lee Hin* v. *United States, supra,* at p. 61. Whether the attorney in the *Lee Hin* case could have corrected the transcript in that case after he learned of the objection to his procedure in the *Chang Chow* case does not appear, but apparently the court below felt that the same rule should be applied to the identical situations in the two cases.

In any event, the question of remanding the case to the District Court was one addressed to the sound discretion of the court below. *Barber Asphalt Co.* v. *Standard Co.,* 275 U. S. 372, 384; *Chang Chow* v. *United States,* 286 U. S. 530. There is no showing of an abuse of discretion here. When the equity rules were first adopted the courts were naturally reluctant to deal summarily with infractions. As early as 1914, however, the Circuit Court of Appeals for the Sixth Circuit pointed out that drastic penalties would attend disregard of the rules after the period of transition. *In re General Equity Rule 75,* 222 Fed. 884. In several quite recent cases, one in the court below, the evidence has been wholly disregarded, resulting in a dismissal unless some other question was involved which could be decided without the evidence. *Walker* v. *Lee,* 71 F. (2d) 622 (C. C. A. 9th); *Chickasaw Wood Products Co.* v. *Paysinger,* 84 F. (2d) 476 (C. C. A. 8th); *Trust Co. of Florida* v.

Gault, 69 F. (2d) 133 (C. C. A. 5th); *In re Meifert*, 57 F. (2d) 861 (C. C. A. 6th). This Court has also added the weight of its views to the need for meticulous compliance with the rules. *Barber Asphalt Co.* v. *Standard Co., supra; Fairbanks, etc., Co.* v. *American Co.*, 276 U. S. 305; *Local 167* v. *United States*, 291 U. S. 293, 296.

In 1934, the court below again called the matter of authentication to the attention of the bar. *Title & Trust Co.* v. *Wernich*, 68 F. (2d) 811. In view of this long period of tolerance and the repeated warnings, it cannot now be said that the court below was unjustified in now insisting that a failure to comply with the rule, no justification being shown, should not be condoned.

II

IF THE ISSUE OF RES JUDICATA IS PROPERLY BEFORE THIS COURT, IT SHOULD BE HELD THAT THE DECISION OF THE BOARD OF TAX APPEALS IS BINDING ON THE BANKRUPTCY COURT

If the error of the court below was in failing to remand the case to the District Court for a proper statement of evidence, it seems clear that the case should now be remanded to the court below with instructions to proceed in that fashion. In that event, the merits of petitioner's claim need not be considered by this Court until they have been passed upon by the Circuit Court of Appeals. If, however, the court below erred in not deciding the issues on the merits upon the record before it, the

questions are also properly before this Court. As we have stated above (pp. 14–15), we believe that the precise issue cannot be defined from the record properly before the Court, and that the only issue could be whether a decision of the Board of Tax Appeals could ever be *res judicata* in a bankruptcy court. However, in the event that the Court concludes to the contrary, and because the petition for certiorari raises the general question, we proceed to discuss it.

There is no doubt but that under Section 64 (a) of the Bankruptcy Act (*infra,* p. 39), the bankruptcy court has authority to hear and determine any question as to the amount or legality of a tax owed by a bankrupt. The Government is required to file its claim as would any other claimant, and have the merits of its claim determined. *In re Anderson,* 279 Fed. 525 (C. C. A. 2d). The question, then, is not the extent of the court's jurisdiction, but whether, in view of Section 274 (a) of the Revenue Act of 1928 (*infra,* p. 43), its jurisdiction is exclusive in a case where the petition is filed with the Board prior to the adjudication in bankruptcy. If there is concurrent jurisdiction in such a case, the further question arises whether, if the Board's decision is rendered first, that decision is *res judicata* on the bankruptcy court.

There can be no question under Section 274 (a) that the Board of Tax Appeals has no jurisdiction to entertain a petition for the redetermination of

the deficiency of one already adjudged a bankrupt. *In re Clayton Magazines*, 77 F. (2d) 852 (C. C. A. 2d); *Plains Buying and Selling Association* v. *Commissioner*, 5 B. T. A. 1147. However, Section 274 (a) also provides that a claim for a deficiency may be presented for adjudication to the bankruptcy court "despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board." This phrase, we submit, without more, implies that the Board does not lose jurisdiction already acquired. No provision is made for the dismissal of proceedings pending before the Board. It would seem to follow that if the Board's jurisdiction is properly invoked, it may be retained, and when its decision is rendered first, it is conclusive.

But if there were any doubt as to the meaning of Section 274 (a), the legislative history of the section supports this construction.[4] It shows clearly the intention of Congress to provide that, when a petition has already been filed with the Board prior to the adjudication in bankruptcy, the Board and the bankruptcy court are to have concurrent jurisdiction, and if the Board's decision is rendered first, the bankruptcy court is expected to follow it.

Section 274 first appeared in the Revenue Acts as Section 282 (a) of the Revenue Act of 1926. The provision was introduced in the Senate, and as in-

[4] The legislative history of the provision is set out in detail in the Board's decision in *Plains Buying and Selling Association* v. *Commissioner*, 5 B. T. A. 1147.

troduced provided in part as follows (H. R. 1, 69th Cong., 1st Sess., p. 149):

> Claim for the deficiency may be presented to the court before which the bankruptcy or receivership proceeding is pending, for adjudication in accordance with law. If any proceeding for redetermination of such deficiency under the provisions of this Act is pending before the Board at the time of such adjudication of bankruptcy or appointment of a receiver and no decision of the Board, final or otherwise, has been rendered therein, then such proceeding shall be dismissed by the Board.

In reporting this provision to the Senate the Senate Committee on Finance said (S. Rep. 52, 69th Cong., 1st Sess., p. 31):

> Section 282: During bankruptcy proceedings or State or Federal receivership proceedings, the assets of the taxpayer are placed within the control of the bankruptcy court or the court of equity in which the receivership proceedings are instituted, whenever the taxpayer has been finally adjudicated a bankrupt or the receiver has been finally appointed. If during the pendency of the bankruptcy or receivership proceeding, a proceeding is pending before the board or on appeal therefrom for the redetermination of a deficiency, the Commissioner of Internal Revenue would, despite a favorable decision for the Government, be unable to assess and distrain upon

the assets under the control of the bankruptcy or equity court. The section therefore provides, in case of determination of deficiency, that if petition for redetermination therefor has not been presented to the board, the deficiency shall be assessed and the claim presented to the bankruptcy or equity court. If petition for a redetermination has been presented to the board but is not on appeal therefrom, the proceedings shall be dismissed and the deficiency assessed and claim therefor presented to the bankruptcy or equity court. If proceedings for determination of a deficiency are on appeal before the Circuit Courts of Appeal or the United States Supreme Court, the committee deems it advisable to permit these courts finally to determine the deficiency rather than dismiss the proceeding. Pending such final decision on appeal, claim for the amount of the deficiency may be presented to the bankruptcy or equity court in the amount allowed by the board, or if decision is reached by such appellate courts prior to the termination of the receivership or bankruptcy proceedings, then such claim may be modified to accord with the decision.

* * * * *

Thus, when the provision was introduced in the Senate it was contemplated that any proceeding pending before the Board at the time of the adjudication of bankruptcy should be dismissed.

This provision, however, was changed in the course of the passage of the bill to read, in so far as it is material, in the same way as the provision here under consideration (Sec. 274 (a)). In explanation of the changed provision the Conference Report (H. Conference Rep. 356, 69th Cong., 1st Sess., pp. 45–46) states:

> Amendment No. 89: The Senate amendment adds a new section, the House bill containing no corresponding provisons. The House recedes with an amendment making a clerical change. The provisions of the Senate amendment are summarized in the following paragraphs.
>
> During bankruptcy proceedings or State or Federal receivership proceedings the assets of the taxpayer come within the control of the bankruptcy or equity court whenever the taxpayer has been finally adjudicated a bankrupt by the bankruptcy court or the receiver has been finally appointed by the equity court. If a deficiency is determined by the commissioner during the pendency of such proceedings, the amendment permits the deficiency to be assessed and the bankruptcy or receivership proceedings to continue despite the prohibitions of section 274 (a). *If a petition for the redetermination of a deficiency has been filed with the board prior to the adjudication of bankruptcy or the appointment of a receiver, the amendment permits the proceedings for the redetermination of the deficiency to be*

continued simultaneously with the bankruptcy or receivership proceedings. The claim for the amount of the deficiency may, of course, be filed with the bankruptcy or equity court. In case of final decision of the board before termination of the bankruptcy or receivership proceedings, a copy of the decision could be filed with the bankruptcy or equity court and the decision would presumably be followed by such courts. During the pendency of the bankruptcy or receivership proceedings a deficiency may be assessed in accordance with the final decision of the board, but the amount thereof may not be collected by distraint against the assets while under the jurisdiction of the bankruptcy or equity court.

The bankruptcy and receivership proceedings do not foreclose any unsatisfied portion of the claim of the United States and such portion may be collected by distraint or otherwise within six years after the termination of the bankruptcy or receivership proceedings. In case the final decision on appeal from the board in a proceeding for redetermination of a deficiency is reached after termination of the bankruptcy or equity proceedings, such portion of the deficiency allowed as has not already been satisfied may likewise be collected by distraint or otherwise within six years after the termination of the bankruptcy or receivership proceedings. [Italics supplied.]

It is clearly evident from this legislative history that Congress intended the Board to continue its consideration of the merits of the tax if the petition had been filed before the bankruptcy proceedings began. Congress realized, however, that a timely claim had to be filed in the bankruptcy court, or the decision of the Board when finally rendered would be ineffective to save the tax because of the likelihood that the bankrupt estate would already have been distributed. It was doubtful, however, if a claim could have been filed without some specific statutory authority, because in the ordinary case the Government was precluded from taking any action in court to collect a tax which was under consideration by the Board of Tax Appeals. Sec. 272 (a), Revenue Act of 1928. The language of Section 274 (a), therefore, authorizing the presentation of claims to the bankruptcy court "despite the pendency of proceedings for the determination of the deficiency in pursuance of a petition to the Board", constitutes that authority. It does not, we submit, support the contention that the Board's jurisdiction was to cease upon an adjudication in bankruptcy. On the contrary, it was designed to assure the collection of any deficiency the Board might determine.

In view of this legislative history, the Board of Tax Appeals has consistently held that where it has acquired jurisdiction prior to the adjudication in

bankruptcy, it will not dismiss the proceedings before it upon the adjudication. *Plains Buying and Selling Association* v. *Commissioner,* 5 B. T. A. 1147; *Hoffman* v. *Commissioner,* 7 B. T. A. 303; *Cunningham* v. *Commissioner,* 20 B. T. A. 428. The Commissioner likewise, in his regulations (see Art. 1191, Regulations 74, *infra,* p. 47) has assumed that the Board should not dismiss a proceeding over which it has taken jurisdiction before the adjudication in bankruptcy, and that the Board and the bankruptcy court have concurrent jurisdiction in such cases. By Article 1192 (*infra,* p. 48) he has provided that in the case of a final decision of the Board before a determination of the bankruptcy proceeding a copy of the Board's decision may be filed by the Commissioner with the bankruptcy court.

There is, of course, no inherent reason why the adjudication of the liabiilty of a debtor *in personam* may not be had in some court other than that which has control of the *res. Riehle* v. *Margolies,* 279 U. S. 218, 224. It is true that that case involved an equity receivership and that this Court there pointed out that the decisions of the lower Federal courts were somewhat in conflict on the question whether a bankruptcy court was concluded by a prior decision of a State court. While this Court then found it unnecessary to determine what the correct rule should be in bankruptcy cases, we sub-

mit that the decision should be the same, at least, so far as the Board of Tax Appeals is concerned. Margolies' right to prosecute his suit was drawn from Section 265 of the Judicial Code. Here the taxpayer exercised its right under the Federal statute and invoked the jurisdiction of the Board of Tax Appeals. As an incident of Margolies' right this Court held (p. 225) that he must have the further right to have the judgment of the State court accepted in the Federal court as an adjudication of the existence of the indebtedness. We submit that it is similarly appropriate here that the decision of the Board of Tax Appeals be accorded the same finality. This is only the ordinary result of the application of the doctrine of *res judicata,* and there is no occasion to make an exception in a bankruptcy court unless the result would be to impair its jurisdiction over assets in its custody.

In *Riehle* v. *Margolies, supra,* this Court rejected the contention that the application of the doctrine of *res judicata* would result in a conflict of jurisdiction, saying (p. 224):

> Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him. *Lion Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77, 88–9. But the judgment of the state court does not purport to deal with the property. The sole question involved there was the existence and amount

> of Margolies' claim against the corporation. And the sole question involved here is the proof of that claim. There is no inherent reason why the adjudication of the liability of the debtor *in personam* may not be had in some court other than that which has control of the *res*. It is only necessary that in the receivership proof of the claim be made in an orderly way, so that it may be established who the creditors are and the amounts due them.

We submit that no sound distinction may be drawn between the situation here and that present in *Riehle* v. *Margolies, supra,* and that upon the reasoning which there prevailed the decision of the Board of Tax Appeals should be accepted here as conclusive with respect to the existence and the amount of the tax claim. This would leave to the bankruptcy court any questions concerning priority.

This conclusion is not inconsistent with Section 64 (b), of the Bankruptcy Act, which provides, in substance, that the court shall order the trustee to pay all taxes and "in case any question arises as to the amount or legality" of the tax, to hear and determine that issue. The section simply has no application, for no question concerning the amount or legality of a tax for a particular year can be said to arise where the Board has already conclusively determined the bankrupt's tax liability for that year.

While the Board's decision on January 4, 1934, preceded the appointment of a receiver on January 10, 1934 (R. 92), and the adjudication in bankruptcy on February 9, 1934 (R. 2–3), it is true that the decision of the Board did not become final until April 4, 1934, when the time for filing the petition for review with the the Circuit Court of Appeals expired. (R. 19.)[5] But the Board's decision did become final before a decision was rendered by either the referee or the bankruptcy court in this proceeding, and, in fact prior to the hearing before the referee. (R. 7.) Since it is priority of judgment that renders a decision *res judicata* (*Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716; *Larsen* v. *Northland Trans. Co.,* 292 U. S. 20; *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620), it appears that the merits of the tax had been conclusively determined prior to the time when the jurisdiction of the bankruptcy court attached.

The effect of Section 274 (a) in conferring concurrent jurisdiction on the Board and on the bankruptcy court is thus similar to that exercised by the Board and the District Courts in cases where an appeal before the Board was taken under the Revenue Act of 1924, but had not been decided prior to the Revenue Act of 1926. In *Old Colony Trust*

[5] See, also, Section 1001, as amended, and Section 1005 of the Revenue Act of 1926 (Appendix, *infra*, pp. 40–41).

Co. v. *Commissioner, supra,* this Court pointed out that, by virtue of Section 283 (b) of the Revenue Act of 1926, a taxpayer so situated had the option of paying the tax and suing in the District Court, notwithstanding his appeal to the Board. In explanation of the effect of this provision, the Court said (p. 728):

> The truth seems to be that in making provision to render conclusive judgments on petitions for review in the Circuit Courts of Appeals, Congress was not willing in cases where the Board of Tax Appeals had not decided the issue before the passage of the Act of 1926, to cut off the taxpayer from paying the tax and suing for a refund in the proper District Court. But the apparent conflict in such cases can be easily resolved by the use of the principles of *res judicata.* If both remedies are pursued, the one in a District Court for refund, and the other on a petition for review in the Circuit Court of Appeals, the judgment which is first rendered will then put an end to the questions involved and in effect make all proceedings in the other court of no avail. Whichever judgment is first in time is necessarily final to the extent to which it becomes a judgment.

In the *Old Colony Trust Co.* case the Court did, it is true, apparently have in mind a situation in which the decision of the Board had been reviewed by a Circuit Court of Appeals. However, there is

no reason to distinguish a case in which the decision of the Board has become final by reason of the failure to appeal. Decisions of the Board have frequently been accepted as *res judicata*. For example, with respect to cases arising subsequent to the Revenue Act of 1926, the statutes have provided that, with certain exceptions, the District Courts and the Court of Claims do not have authority to redetermine issues which were settled or could have been settled in previous proceedings before the Board. See Section 322 (c), Revenue Act of 1932, *infra*, p. 45. *Bankers' Reserve Life Co.* v. *United States*, 44 F. (2d) 1000 (C. Cls.), certiorari denied, 283 U. S. 836; *American Woolen Co.* v. *White*, 56 F. (2d) 716 (C. C. A. 1st); *Western Wheeled Scraper Co.* v. *United States*, 72 F. (2d) 487 (C. C. A. 7th), certiorari denied, No. 237, October 12, 1936; *Bindley* v. *Heiner*, 38 F. (2d) 489 (W. D. Pa.); *Green* v. *MacLaughlin*, 55 F. (2d) 423 (E. D. Pa.); *Warren Mfg. Co.* v. *Tait*, 60 F. (2d) 982 (Md.). But when the filing of the suit antedated the filing of the petition before the Board the doctrine of *res judicata* has been applied. *Camp* v. *United States*, 44 F. (2d) 126 (C. C. A. 4th); *Ohio Steel Foundry Co.* v. *United States*, 38 F. (2d) 144 (C. Cls.).

Petitioner relies upon *New Jersey* v. *Anderson*, 203 U. S. 483; *Commonwealth of Massachusetts* v. *Meehan*, 67 F. (2d) 638 (C. C. A. 1st) (see also *Henderson County, N. C.* v. *Wilkins*, 43 F. (2d) 670 (C. C. A. 4th)), as authority for the principle that

the bankruptcy court is not concluded by a decision of the Board. Primarily, those cases related to the conclusiveness of decisions of State tax officials. Of course, we do not urge that the Commissioner's determination was conclusive. See *In re George F. Redmond & Co.*, 17 F. (2d) 128 (Mass.); *In re W. P. Williams Oil Corp.*, 265 Fed. 401 (W. D. Ky.). The Board's decisions, however, have the effect of judgments. *Old Colony Trust Co.* v. *Commissioner, supra.* In so far as *New Jersey* v. *Anderson, supra,* and *Commonwealth of Massachusetts* v. *Meehan, supra,* held that the bankruptcy court could not be bound by a decision of the State court holding that a particular exaction was a tax, they are not in point here. See, also, *In re Heffron Co.*, 216 Fed. 642 (N. D. N. Y.). The fact that the Federal courts cannot be foreclosed from applying the Federal construction to a Federal statute is no authority for holding that a prior decision of the State court concerning the liability of the bankrupt under a statute admittedly imposing a tax would not be *res judicata.* In any event, there was no statute involved in those cases which is analogous to Section 274 (a).

Moreover, apart from the fact that the prior decision in *New Jersey* v. *Anderson, supra,* was by a state tribunal, the decision turned on both the status of the State Board of Assessors of New Jersey, whose decision was urged as a bar, and on the absence of any expressed intent of Congress to require Federal courts to abide by the decision of

such a body. One question presented in that case concerned the amount of the tax. An assessment had been made by the State Board of Assessors of New Jersey, and the question was whether its decision was conclusive in the bankruptcy court. This Court held that it was not, saying (p. 494):

> We do not think it was the intention of Congress to conclude the bankruptcy courts by the findings of boards of this character * * *.

We submit that a different result is required in the present case. The Board of Tax Appeals is a quasi-judicial body (*Old Colony Trust Co.* v. *Commissioner, supra*), and wholly different from the New Jersey Board of Assessment, which corresponds to the Commissioner of Internal Revenue in the Federal tax organization. The Board of Tax Appeals corresponds quite clearly to the Prerogative Court in New Jersey. Cf. *Hill* v. *Martin*, 296 U. S. 393, 398. Moreover, the Revenue Acts clearly intend that the decisions of the Board of Tax Appeals shall be conclusive. Section 322 (c), Revenue Act of 1932, *infra*, p. 45.

There are also cases in which the suit in the State court had been filed but not decided prior to the filing of the petition in bankruptcy, or, in some cases, prior to the adjudication, where the courts may be said to have taken a different view. *In re Paramount Public Corporation*, 85 F. (2d) 42 (C. C. A. 2d); *Royal Baking Powder Co.* v. *Hessey*, 76 F. (2d) 645 (C. C. A. 4th), certiorari

denied, 296 U. S. 595; *In re James A. Brady Foundry Co.*, 3 F. (2d) 437 (C. C. A. 7th). There is no reason now to question whether these decisions conflict with the principles stated in *Richle* v. *Margolies*, 279 U. S. 218, 228, *supra*, p. 28–30. In the present case, the tax claim was decided prior to the time that the jurisdiction of the bankruptcy court attached. See *In re Anton*, 11 F. Supp. 345 (Minn.), and cases cited. See also Collier on Bankruptcy (13th Ed., 1923), Vol. 2, pp. 1389–1390.

The petitioner argues further that the doctrine of *res judicata* does not apply (1) because the bankruptcy proceeding involves the rights and claims of all creditors against the bankrupt corporation, and not merely the claim of the Government for taxes, and (2) because the parties are not the same as those before the Board.

We think there is little merit to the first contention. It is the Government's claim for taxes of the bankrupt for the years 1927, 1928 and 1929 that was involved both before the Board and before the bankruptcy court, and the same issues concerning those taxes were raised in both tribunals. The fact that other claimants have presented other claims can have no bearing upon the existence and amount of the Government's claim. The conflicting claimants are provided for by a common liquidation in one forum, the bankruptcy court. The Board of Tax Appeals did not attempt to deal with the liquidation.

Petitioner's second point is likewise without merit. *Riehle* v. *Margolies,* 279 U. S. 218, decided that the fact that the proceeding in the State court was between the creditor and the insolvent corporation, and not between the receiver and the corporation, did not prevent the receiver from being barred by the prior adjudication. The same rule should apply here. The taxpayer and the trustee were in privity and that is all that is required for the application of the doctrine of *res judicata. Riehle* v. *Margolies, supra; Mitchell* v. *First Nat. Bank of Chicago,* 180 U. S. 471. See also *Tait* v. *Western Md. Ry. Co., supra; Second Nat. Bank of Saginaw* v. *Woodworth,* 66 F. (2d) 170 (C. C. A. 6th).

We submit, therefore, that if the issue of *res judicata* is properly before this Court, it should conclude that the decision of the Board of Tax Appeals was conclusive.

III

Petitioner has, in his brief, also argued the merits of the claim for taxes. It is clear that the decision of that question requires a consideration of the evidence, and cannot be decided unless the statement is properly authenticated. Moreover, the issue was not raised in the petition for certiorari, and is not before the Court. *Helvering* v. *Taylor,* 293 U. S. 507; *Gunning* v. *Cooley,* 281 U. S. 90, 98.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

STANLEY REED,
Solicitor General.
ROBERT H. JACKSON,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
HELEN R. CARLOSS,
Special Assistants to the Attorney General.
CHARLES A. HORSKY,
Attorney.

DECEMBER 1936.

APPENDIX

Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as amended:

SEC. 25. *Appeals.*—(*a*) Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeals of the United States * * * in the following cases, to wit: * * * (3) from a judgment allowing or rejecting a debt or claim of $500 or over. * * *. (U. S. C., Title 11, Sec. 48 (a).)

SEC. 63. *Debts provable against.*—(*a*) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or * * *, absolutely owing at the time of the filing of the petition against him, * * * (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, * * *. (U. S. C., Title 11, Sec. 103.)

SEC. 64. *Debts which have priority.*—(*a*) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in the order of priority as set forth in paragraph (b) hereof: * * * and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

* * * * *

(U. S. C., Title 11, Sec. 104.)

General Order in Bankruptcy XXXVI, as amended April 17, 1933, 288 U. S. 621, 632:

APPEALS

Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in equity in courts of the United States.

Revenue Act of 1926, c. 27, 44 Stat. 9, 109, 110:

SEC. 1001. (a) [4] The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered.

* * * * *

SEC. 1005. (a) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

---

[4] As amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169 (U. S. C., Title 26, Sec. 642).

(3) Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

* * * * *

(U. S. C., Title 26, Sec. 640.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 272. PROCEDURE IN GENERAL.

(a) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

For exceptions to the restrictions imposed by this subsection, see—

(1) Subsection (d) of this section, relating to waivers by the taxpayer;

(2) Subsection (f) of this section, relating to notifications of mathematical errors appearing upon the face of the return;

(3) Section 273, relating to jeopardy assessments;

(4) Section 274, relating to bankruptcy and receiverships; and

(5) Section 1001 of the Revenue Act of 1926, as amended, relating to assessment or collection of the amount of the deficiency determined by the Board pending court review.

(b) *Collection of deficiency found by Board.*—If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

* * * * *

SEC. 273. JEOPARDY ASSESSMENTS.

(a) *Authority for making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand

shall be made by the collector for the payment thereof.

* * * * *

SEC. 274. BANKRUPTCY AND RECEIVERSHIPS.[5]

(a) *Immediate assessment.*—Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this title upon such taxpayer shall, despite the restrictions imposed by section 272 (a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. *In such cases the trustee in bankruptcy or receiver shall give notice in writing to the Commissioner of the adjudication of bankruptcy or the appointment of the receiver, and the running of the statute of limitations on the making of assessments shall be suspended for the period from the date of adjudication in bankruptcy or the appointment of the receiver to a date 30 days after the date upon which the notice from the trustee or receiver is received by the Commissioner; but the suspension under this sentence shall in no case be for a period in excess of two years.* Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented,

[5] The sentence in italics was added by Section 505 of the Revenue Act of 1934, c. 277, 48 Stat. 680.

for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver.

(b) *Unpaid claims.*—Any portion of the claim allowed in such bankruptcy or receivership proceeding which is unpaid shall be paid by the taxpayer upon notice and demand from the collector after the termination of such proceeding, and may be collected by distraint or proceeding in court within six years after termination of such proceeding. Extensions of time for such payment may be had in the same manner and subject to the same provisions and limitations as are provided in section 272 (j) and section 297 in the case of a deficiency in a tax imposed by this title.

SEC. 601. BOARD OF TAX APPEALS.—PROCEDURE.

Sections 906 and * * * of the Revenue Act of 1924, as amended, are further amended to read as follows:

"SEC. 906. (a) * * *

"(d) A decision of the Board (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Board. If the Board dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or

if the Board dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Board, and the decision of the Board shall be held to be rendered upon the date of such entry.

* * * * *

(U. S. C., Title 26, Sec. 617 (c).)

Revenue Act of 1932, c. 209 47 Stat. 169, 242, Section 322 (c):

(c) EFFECT OF PETITION TO BOARD.—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

Revised Statutes:

> SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (U. S. C., Title 31, Sec. 191.)

United States Supreme Court Equity Rules, as amended May 31, 1932, 286 U. S. 570:

> RULE 75. RECORD ON APPEAL—REDUCTION AND PREPARATION.
>
> In case of appeal:
>
> (a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *praecipe* which shall indicate the portions of the record to be incorporated into the transcript on such appeal. * * *
>
> (b) The evidence to be included in the record * * * shall not be set forth in full, but shall be stated in simple and condensed form, * * *. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the

same in the clerk's office for the examination of the other parties at or before the time of filing his *praecipe* under paragraph (a) of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete, or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

> ART. 1191. *Bankruptcy and receiverships.*—During bankruptcy proceedings in Federal courts under the National Bankruptcy Act of 1898, as amended, or during equity receivership proceedings in either Federal or State courts, the court making the adjudication of bankruptcy or appointing a receiver for any taxpayer has control over the assets of such taxpayer, and the collection of taxes due can not be made by distraining while the bankruptcy or receivership proceeding is pending.
>
> Collectors should, promptly after notice of outstanding liability against a taxpayer in

bankruptcy or in receivership, file claim in the appropriate court whether unpaid taxes involved have been assessed or not, except in cases where departmental instructions direct otherwise; for example, where taxes of the bankrupt or insolvent taxpayer are secured by a sufficient bond.

Under sections 3466 and 3467 of the Revised Statutes and section 64 (a) of the National Bankruptcy Act taxes take priority over claims of general creditors in cases of bankruptcy, receivership, and insolvency, and the trustee, receiver, or assignee may be held personally liable for failure on his part to protect the priority of the Government respecting taxes of which he has notice. Bankruptcy courts have complete jurisdiction under section 64 (a) of the National Bankruptcy Act to determine all disputes regarding the amount and validity of taxes of a bankrupt. Bankruptcy and receivership proceedings do not foreclose or discharge any portion of a claim of the United States for taxes which has been allowed by the court having jurisdiction over same and which remains unsatisfied after termination of the bankruptcy or receivership proceeding.

ART. 1192. *Immediate assessments in bankruptcy and receivership cases.*—Where the Commissioner has determined that a deficiency is due in respect of income tax and the taxpayer has filed a petition with the Board of Tax Appeals prior to adjudication of bankruptcy or the appointment of a receiver, the trustee or receiver appointed by the court may prosecute the taxpayer's appeal before the Board as to that particular determination. In no case shall a petition be filed with the Board for a redetermination of the deficiency after the adjudication of bankruptcy or the appointment of a receiver.

Claim for the amount of a deficiency where properly before the Board for consideration may be filed with the bankruptcy or equity court without awaiting final decision of the Board. In case of final decision of the Board before determination of the bankruptcy or receivership proceeding, a copy of the Board's decision may be filed by the Commissioner with the bankruptcy or equity court.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1956